DOCUMENT RESUME

ED 074 920 HE 003 889

AUTHOR	Roberts, Sylvia
TITLE	Equality of Opportunity in Higher Education - The Impact of Contract Compliance and the Equal Rights Amendment.
INSTITUTION	National Organization for Women, Washington, D.C. Legal Defense and Education Fund.
PUB DATE	15 Jan 73
NOTE	30p.; Paper presented at the annual meeting of the Association of American Colleges (San Francisco, January 15, 1973)
EDRS PRICE	MF-$0.65 HC-$3.29
DESCRIPTORS	Equal Opportunities (Jobs); *Federal Legislation; Females; *Feminism; *Higher Education; *Sex Discrimination; *Women Professors; Working Women

ABSTRACT

In discussing the impact of contract compliance and the Equal Rights Amendment on equality of opportunity in higher education, the author focuses primarily on women employed as faculty members and staff at universities and colleges. The basic and fundamental fact is that women have been treated differently, and that is to say, less well, than men. Women are not hired and promoted at the same rate, nor have they been paid as well as their male counterparts in higher education. In October 1972, HEW issued the Higher Education Guidelines that called for (1) nondiscriminatory practices in hiring and promotion of women and minorities in higher education, and (2) affirmative action programs to assure that any discriminatory practices in existence will be eradicated. Colleges and universities can now take one of two courses of action. They can either listen to the demands and charges of women and attempt to rectify whatever adverse conditions exist, or they can ignore such demands and face possible legal proceedings. (HS)

ED 074920

PRESENTATION

at

ANNUAL MEETING

of the

ASSOCIATION OF AMERICAN COLLEGES

January 15, 1973

San Francisco Hilton Hotel

Equality of Opportunity in Higher Education - The Impact of Contract Compliance and the Equal Rights Amendment

by

SYLVIA ROBERTS

President, NOW Legal Defense and Education Fund

Session: AAC CONCURRENT SESSIONS

Monday, January 15, 1973

2:00 - 3:45 P.M.

HE 003 889

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Introduction

In discussing the impact of contract compliance and the Equal Rights Amendment on equality of opportunity in higher education, I should like to focus primarily on women employed as faculty members and staff at universities and colleges, with perhaps the heavier emphasis on faculty women.

To gain an understanding of effects anticipated in the future, it is helpful to give some attention to the background and past events which bear on the status of women in academic settings, and the efforts made to date to bring about change.

The basic and fundamental fact is that women have been treated differently, and that is to say, less well, than men. Women are not hired and promoted at the same rate, nor have they been paid as well as their male

counterparts.[1] A study of twenty prestigious public and private institutions discloses that women held only one per cent of the top posts in physical and biological sciences, two per cent in social sciences and four per cent in the humanities.[2] Such underrepresentation of women cannot

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1. The "Fact Sheet on the Earnings Gap," a publication of the Women's Bureau, Wage & Labor Standards Dvsn., U.S. Department of Labor (Washington, D.C., 1970), p. 3, gives these figures:

MEDIAN ANNUAL SALARIES OF TEACHING STAFF IN COLLEGES AND UNIVERSITIES, BY SEX, 1965-66

	Number		Median annual salary	
Teaching staff	Women	Men	Women	Men
Total----------	26,734	118,641	$ 7,732	$ 9,275
Professors----------	3,149	32,873	11,649	12,768
Associate Professors	5,148	28,892	9,322	10,064
Assistant Professors	8,983	37,232	7,870	8,446
Instructors---------	9,454	19,644	6,454	6,864

See also Alan E. Bayer and Helen S. Astin, "Sex Differences in Academic Rank and Salary Among Science Doctorates in Teaching," Journal of Human Resources, 1968, 3, 191-200; Susan B Kaufmann, "Few Women get Positions of Power in Academe, Survey Discloses," The Chronicle of Higher Education, 5, November 30, 1970, pp. 1,4; see also Linda S. Fidell, "Empirical Verification of Sex Discrimination in Hiring Practices in Psychology," American Psychologist, 25, December 1970, pp. 1094-1098. See also, "Standards for Women in Higher Education: Affirmative Policy in Achieving Sex Equality in the Academic Community," published by the American Association of University Women, an organization with over 173,000 members.

2. John B. Parish, in compiling data for his work, "Women in Top Level Teaching and Research," Journal of American Association of University Women, January 1962, studied twenty institutions, Chicago, Columbia, Cornell, Harvard, Johns Hopkins, Massachusetts Institute of Technology, Northwestern, Princeton, Stanford, Yale, California (Berkeley), City College of New York, Indiana, Illinois, Michigan, Michigan State, Minnesota, New York University, Ohio State and Penn State.

be attributed to the lack of women holding doctorates,[3] or any policy of universities to hire women with lesser qualifications than men. On the contrary, academic women must be more highly qualified than male competitors to secure posts.[4] Therefore, the pool of women employed at universities is necessarily one in which a rather rigorous selection process has already taken place. It would seem

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3. Percentages of doctorates awarded to women in 1967-68 in selected fields, as reflected in "Earned Degrees Conferred: Part A--Summary Data," Office of Education, OE-54013-68A, are as follows:

General Biology	29.0 %
General Zoology	14.8
Biochemistry	22.3
English and Literature	27.4
Psychology	22.5
Sociology	18.5
Anthropology	23.9

4. See Dr. Lawrence A. Simpson's work, "A Myth is Better Than a Miss: Men Get the Edge in Academic Employment," College and University Business, McGraw-Hill (1970), in which he observes:

> "Prospective academic women must recognize that they should, in effect, be more highly qualified than their male competitors for higher education positions . . . . Perhaps the most important implication of the study is that employing agents in higher education must seriously re-examine their own attitudes regarding academic women and be keenly aware of any prejudice or rationalizations which cause academic women to be treated in any way other than as productive human beings."
>
> (Emphasis supplied)

undefensible to argue that institutions follow the practice of conferring their highest academic degrees on women of less intelligence and potential than men. The elimination of these factors leaves the contention that women hold a lesser place in academia because of processes which come into operation after they have won their degrees and obtained employment. One of these might be relegation of women to different appointments than men; adjunct or lecturer positions in lieu of regular faculty appointments given to men. Another might be different class assignments for women, such as large undergraduate courses for a long period of time, decreasing the possibility of coming in contact with graduate students and consequently directing graduate research, theses and dissertations. Another might be departmental committee service determined by the chairman or head which go uniformly to men and not women. Still another might be support of research. All of these elements are crucial to promotion, and yet are often times the very criteria which women are prevented from meeting, despite their willingness to demonstrate their competence in all phases of academic work.

These examples of different treatment and their consequences were the basis for claims filed January 31, 1970,

by women, with administrative agencies, in the form of a class action complaint directed against all universities and colleges receiving federal contracts, by the Women's Equity Action League (WEAL), under Executive Order 11246, as amended.[5] Thereafter, WEAL, the National Organization for Women and individual women, filed similar complaints, relative to 350 universities, frequently accompanied by data and statistics indicating the salaries and rank of the women in the respective institutions. The United States Department of Health, Education and Welfare (HEW), the agency charged with the responsibility of securing compliance with the Executive Order, hired additional staff in its nine regional offices,[6] and in the course of

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5. The Executive Order required government contractors to refrain from discriminating against women and minorities, to adopt affirmative action policies, and in the event of non-compliance, the contract could be canceled, terminated, or suspended, 41 C.F.R. 60-1.5.

6. Science, Vol 175 at p. 214 (July 16, 1971), "Sex Discrimination on Campus, Michigan Wrestles with Equal Pay;" Nancy Grouchon, "Discrimination: Women Charge Universities and Colleges with Bias," Science, Vol. 168, May 1, 1970; pp. 559-61.

investigating over 100 cases, caused federal funds to be delayed at several universities, and the delay of forty new contracts.[7]

Another effect of this articulation of grievances by women was the introduction of legislation by Congresswoman Edith Green in 1970.[8] In that connection, lengthy hearings were held, and data delineating sex discrimination was submitted with reference to such universities as Brandeis University, the state colleges of California, Illinois,

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7. Science, Vol.175, p. 151 (January 14, 1972), "University Women's Rights: Whose Feet are Dragging?" This article reports funds at Harvard, University of Michigan, Columbia, Cornell and Duke were actually delayed; while St. Louis University, Yeshiva, University of Rochester, New York University, University of Pittsburgh and Northwestern had holds placed against federal funds, Id., at p. 152. See also, Robert J. Bazell, "Sex Discrimination: Campuses Face Contract Losses over HEW Demands," Science 170, November 20, 1970, pp. 834-5, and Albert A. Logan, Jr., "Universities Told They must Grant Equal Opportunity to Women," Chronicle of Higher Education, 4, July 6, 1970. Dr. Bernice Sandler, Executive Associate and Director, Project on the Status of Women of the American Association of Colleges, Washington, D. C., reports that $23,000,000 in federal funds has been delayed.

8. Section 805 of H.R. 16098 was aimed at prohibiting "discrimination against women in federally assisted programs, and in employment in education; to extend the Equal Pay Act so as to prohibit discrimination in administrative, professional and executive employment; and to extend the jurisdiction of the U. S. Commission on Civil Rights to include sex."

Kansas, New York, Wisconsin, the University of Chicago, Cornell University, Columbia University and New York University Law School.[9]

In addition, women sought redress in the courts, both in individual suits and by class action litigation.[10]

By 1972, Congress was convinced that sex discrimination against academic women was a national problem warranting legislative action, and moved to extend Title VII of the

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9. "Discrimination Against Women," Hearings before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, 91st Congress, 2nd Session, July 1971 (2 Vols.).

10. "Lola Beth Green v. Board of Regents of Texas Tech University," Docket No. 72-1542 (United States Court of Appeals, Fifth Circuit) is the first case to the writer's knowledge to be filed and tried. Judgment for the university was appealed by Dr. Green, and no decision has been rendered as of November 15, 1972. "Dr. Ina Braden v. University of Pittsburgh," Docket No. 71-646, United States District Court, Western District of Pennsylvania, was the first class action to be filed. A motion to dismiss was granted based on lack of jurisdiction under 42 U.S.C. Sections 1983, 1981 and Executive Order 11246 as amended was granted, and no trial was held. An appeal is pending in the United States Court of Appeals, Third Circuit. "League of Academic Women v. Regents of the University of California," Docket No. 72-265, United States District Court for the Northern District of California was the next class action, filed on February 15, 1972; "Dr. Margaret Cussler v. University of Maryland, et al," Docket No. 72-372, United States District Court, Maryland, was filed April 13, 1972, as an individual suit; and "Margaret Menzel v. Florida State University, et al," Docket No. TCA 1834, United States District Court, Northern District of Florida, a class action, was filed in June, 1972.

Civil Rights Act of 1964,[11] and the Equal Pay Act, thus affording the women remedies not available previously. Investigations under both of these provisions are in progress pursuant to charges filed by women, and there is a great likelihood that litigation in federal courts will be forthcoming in the near future.

The Implications of Contract Compliance Procedures Under The Executive Order for Universities and Colleges

After almost two years of compliance reviews of universities, HEW has produced the Higher Education Guidelines, issued October 1, 1972. Reflected therein is the conviction that discrimination does exist on campuses affecting women and minorities, and that principles laid down in the long series of precedents under Title VII of the Civil Rights Act of 1964 are controlling. In general, the Guidelines are built around two tenets: first, non-discrimination, defined as the elimination of all existing discriminatory

11. Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, prohibits discrimination by employers, labor unions, and employment agencies in many conditions of employment, on the basis of race, religion, national origin and sex. In 1972, educational institutions, state and local governments became subject to Title VII, and to the jurisdiction of the Equal Employment Opportunity Commission, which can file legal actions in all instances with the exception of state and local governments.

conditions ". . . whether purposeful or inadvertent," HEW Guidelines, p. 2, to be accomplished by a systematic examination of all employment policies. Because different treatment of women is a given in our society, perpetuated by conditioning of men and women beginning at birth, this directive is unquestionably a difficult assignment. So much of what has been engrained in the traditional operation of a university seems, on its face, not to be designed to hinder women's employment and promotion, but this is exactly what results. For example, a time honored method of recruitment is to contact a colleague at another institution for the name of his best young man. If the colleague consulted is a professor at an all male institution, or one which only recently began admitting women, it is clear that women will not even be considered for available posts.

The second theme exhibited by the Guidelines is affirmative action, which implies something beyond merely the discarding of discriminatory policies, otherwise, there can be little or no hope that discrimination or exclusion would cease. The components of affirmative action are a determination of the numbers of women and minorities which should be employed at various levels, and a setting of goals and timetables. Revised Order 4 prescribes a formula for this

determination: a comparison of the number of women and minorities in the jobs with the number of women and minorities which would reasonably be expected to be in such jobs by reason of their availability. If there is a discrepancy in these figures, goals must be set to recruit, employ and promote qualified members of unrepresented, or underrepresented groups. Such efforts are made with reference to vacancies created by normal growth and attrition in existing positions, not ouster of incumbents, HEW Guidelines, p. 8. If a university sets its goals and timetables, but does not meet them due to an inaccurate estimate of the job openings or some other unforeseen event, there will be no finding of non-compliance by HEW. However, if the failure to meet such goals stems from a failure to re-examine or modify employment policies which have been exclusionary, or from a neglect of measures outlined in the affirmative action plan, the university may be found to be out of compliance, HEW Guidelines, p. 4.

This requirement of an affirmative action plan means that a written plan must be submitted by private institutions only, but the Guidelines strongly urge written plans by public institutions as well, and mention the imminent possibility of this requirement being extended to them. If a

compliance review has been made of either type of institution and deficiencies identified, ". . . 'precise actions,' and 'dates of completion,' to overcome any deficiencies . . ." must be submitted to HEW, Guidelines, p. 2.

Possibly the most important strain detected in the Guidelines, insofar as this discussion is concerned, is the express disavowal of any intent to lower standards, or any basis for urging that a lowering of standards will result:

> "Nothing in the Executive Order requires that a university contractor eliminate or dilute standards which are necessary to the successful performance of the institution's educational and research functions. The affirmative action concept does not require that a university employ or promote any persons who are unqualified. The concept does require, however, that any standards or criteria which have had the effect of excluding women and minorities be eliminated, unless the contractor can demonstrate that such criteria are conditions of successful performance in the particular position involved."

(Emphasis supplied) HEW Guidelines, p. 4.

The fact that such a construction has been placed on the Executive Order 11246 and Revised Order 4 is abundantly clear from this portion of the HEW Guidelines at p. 8:

> "Unfortunately, a number of university officials have chosen to explain dismissals, transfers, alterations of job descriptions, changes in promotion potential or fringe benefits, and refusals to hire, not on the basis of merit or

> some objective sought by the university administration aside from the Executive Order, but on grounds that such actions and 'other preferential treatment regardless of merit' are now required by Federal law. Such statements constitute either a misunderstanding of the law or a willful distortion of it. In either case, where they actually reflect decisions not to employ or promote on grounds of race, color, sex, religion or national origin, they constitute a violation of the Executive Order and other Federal laws."
>
> (Emphasis supplied).

Perhaps this defensive course of conduct commented upon above, finds its source in the rather widespread view that universities are somehow not comparable to private employers, and in any event, should not be called to account for judgments made with respect to employment policies. While private employers have had several years to become accustomed to government regulations in the form of the National Labor Relations Act, the Equal Pay Act and Title VII of 1964, the experience of governmental scrutiny and legal action on behalf of employees is very new to universities.

This defensive reaction may be heightened by the realization that a fundamental and thorough reappraisal of the criteria for promotion and selection is the only way that compliance with the HEW Guidelines and Title VII precedents may be achieved. The response in some quarters has been that academic freedom and requisite discretion

are threatened, with only dire consequences of lowering of standards envisioned as the result.

To assess this response, we must be precise about the content of the words "academic freedom," and "discretion." With respect to the former, the Supreme Court of the United States, in Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967), defined it as " . . . a special concern of the First Amendment, which does not tolerate laws that case a pall of orthodoxy over the classroom," Id., at p. 603. Thus a constitutional right of freedom of speech of academic personnel is protected against interference.

In contrast, the term is presently being used to justify maintenance of policies which have worked to exclude qualified women and minorities. These policies amount to a deprivation of rights under the Fourteenth Amendment, together with other federal, and in some cases, state law. To say that a concept always interpreted as protecting rights of academic personnel can be invoked to justify violations of rights of academic personnel is plainly contradictory. If this interpretation were correct, the term, in effect, becomes merely a code word connoting freedom on the part of universities to discriminate, not freedom for academic personnel to

exercise their rights. The situation is reminiscent of a similar distortion of the word "freedom," in the phrase "freedom of choice," which became a code word for continuation of segregation in our public schools.

As regards "discretion," it too should deteriorate into a code word meaning that the status quo must be upheld. "Discretion" cannot legitimize policies which most always result in hiring and promotion of white males despite the availability of qualified women and minorities.

The HEW Guidelines face this issue squarely, and give evidence of exposure to universities where criteria are unwritten, unavailable and applied in an uneven manner, with the consequence that women and minorities never seem to measure up to the standards used. To correct such conditions, the Guidelines make these stipulations:

> "An employer must establish in reasonable detail and make available upon request the standards and procedures which govern all employment practices in the operation of each organizational unit, including any tests in use and the criteria by which qualifications for appointment, retention, or promotion are judged. It should be determined whether such standards and criteria are valid predictors of job performance, including whether they are relevant to the duties of the particular position in question. This requirement should not ignore or obviate the range of permissible discretion which has characterized employment judgments, particularly in the academic area. Where such discretion appears to have operated

> to deny equality of opportunity, however, it must be subjected to rigorous examination and its discriminatory effects eliminated. There are real and proper limits on the extent to which criteria for academic employment can be explicitly articulated; however, the absence of any articulation of such criteria provides opportunities for arbitrary and discriminatory employment decisions."
>
> (Emphasis supplied).

What is in store for universities concerning selection procedures is indicated to some extent by the landmark Title VII case, Griggs v. Duke Power Company, 401 U.S. 424 (1971), decided by the Supreme Court of the United States. In that case, the court was confronted with an employer who had followed a pattern of different treatment of blacks, just as universities have followed a similar pattern with respect to women and minorities. Immediately after the effective date of Title VII, the employer instituted tests and requirements which operated to disqualify Negroes at a substantially higher rate than white applicants, and which did not serve to predict skill at the jobs in question. The court declared that when a procedure ". . . which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited," Id., at p. 431, and can only be upheld if the employer can show it is a business necessity. In arriving at this conclusion, two points were emphasized by the

court: first, good intention, or lack of overt discrimination, does ". . . not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups that are unrelated to measuring job capability," Id., at p.. 432. Secondly, the identical disclaimer of lowering of standards, as is found in the HEW Guidelines, was made in these words:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
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> * * *
>
> Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."
>
> Id., at pp. 430-431; 436.

What could Griggs v. Duke Power and the HEW Guidelines mean for universities? One might be an in depth analysis of the job descriptions and the tasks actually performed in various positions in the university. This data would supply the basis needed to determine whether or not the

standards and criteria being used are ". . . valid predictors of job performance, including whether they are relevant to the duties of the particular position in question," HEW Guidelines, p. 4. This would bring into discussion some of the informal practices, which rise to a level of requirements or criteria for employment in many instances. One illustration would be the solicitation of applicants from predominantly male institutions. Is this criterion a valid predictor of performance? For all types of academic appointments regardless of department? If so, how can this be validated?

Moreover, criteria would have to be examined for their effect on women and minorities. Do certain of the standards being used for promotion operate as "built-in headwinds" for women and minorities if they are passed over for more desirable class assignments and committee assignments?

The HEW Guidelines on Promotion and Conditions of Work speak directly to these points:

"Promotion

> A contractor is also obligated to make special efforts to insure that women and minorities in its work force are given equal opportunity for promotion. Specifically, 41 CFR 60-2.24 states that this result may be achieved through remedial work study and job training programs; through career counseling programs; through

the posting and announcement of promotion opportunities; and by validation of all criteria for promotion."

(Emphasis supplied) HEW Guidelines, p. 10.

"Conditions of Work

A university employer must ensure nondiscrimination in all terms and conditions of employment, including work assignments, educational and training opportunities, research opportunities, use of facilities and opportunities to serve on committee or decision making bodies."

HEW Guidelines, p. 10.

Singled out as an example of a violation of the Executive Order is the practice of subjecting persons of one sex or minority status to heavier teaching loads, less desirable class assignments or opportunities to apply for research grants or leaves of absence for professional purposes,[12]

HEW Guidelines, p. 10.

What is mandated in these Guidelines is an adoption of nondiscriminatory standards which do not have a disproportionate effect on women and minorities. Such a requirement is a familiar one with the federal courts, probably best illustrated by the decisions growing out of the selection of faculty members when white and black

12. Allegations of just such treatment are contained in the petition filed by Dr. Margaret Cussler in her suit against the University of Maryland, et al, referred to in fn. 10, supra.

schools were integrated.[13] Especially interesting is the aspect of this line of cases which holds that in the event of a history of discrimination, in that instance, segregation, the use of subjective standards in making selection will carry little weight in refuting discrimination when few blacks were chosen, as expressed in this portion of the opinion in Clark v. Board of Education of Little Rock School District, 449 F.2d 493 (8 Cir. 1971), at p. 498:

> "The necessity for establishing nondiscriminatory standards is supported by the statistic that in 1967 there were 134 black principals and that today, after substantial consolidation there are only fifteen."

The more recent case of United States v. Texas Education Agency, 459 F.2d 600 (5 Cir. 1972), also relied on statistics of decreasing numbers of black faculty members as a justification for requiring objective criteria, and reversed the lower court's finding that the dismissals were proper.

Likewise, in Moore v. Board of Education of Chidester School District No. 59, Arkansas. 448 F.2d 709 (8 Cir. 1971), dismissals regarded as warranted by the trial court were

13. Smith v. Concordia Parish School Board, 445 F.2d 285 (5 Cir. 1971); Singleton v. Jackson Municipal School District, 419 F.2d 1211 (5 Cir. 1969); Jackson v. Wheatley School District No. 28 of St. Francis, Arkansas, 430 F.2d 1359 (8 Cir. 1970).

reversed on the appellate court's finding that evidence used in dismissing one of the teachers had been vague and inconclusive. The lack of any plan or procedures and objective criteria was deemed fatal to the defense of the Board of Education, and the court's directions to the Board were clearly stated in this manner:

> "Such a plan should establish standards and procedures for evaluating teachers. It should contain definitions and instructions for the application of the standards to a given teacher and should set forth the methods by which the teacher is to be evaluated."
>
> Id., at p. 712.

The history of discrimination against women, and in effect, segregating them to the lower paying positions demonstrable by statistics, would seem to provide a viable analogy to the cases discussed above. These precedents could be relied upon by women urging that discriminatory, subjective criteria had been used to their detriment.

Certainly, re-examination of the whole question of standards for selection and promotion will elicit much study and comment, but it should be remembered that it is but one phase of conditions of employment covered by

Title VII and the HEW Guidelines.[14] Time does not permit discussion of the relevant decisions under Title VII which would have a bearing on all of them.

The Impact of the Equal Rights Amendment On Universities and Colleges

The Equal Rights Amendment, finally passed by Congress over forty years after its introduction, is now well on its way to ratification by the requisite thirty-eight states. It will take effect two years after the last state ratifies, giving states ample time to conform their laws to its straightforward dictate that "Equality of Rights under the law shall not be denied or abridged by the United States or any State on account of sex."

It is significant that a part of Congress' rationale for passage of the Equal Rights Amendment, was its recognition of discrimination against women in education with respect to admission and employment, as revealed in the following extract from the Report of the Senate Committee on the Judiciary, March 14, 1972, at p. 2:

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14. Recruitment, hiring, anti-nepotism policies, placement, job classification, and assignment, training, promotion, termination, conditions of work, rights and benefits--salary, back pay, leave policies, employment policies relating to pregnancy and childbirth, fringe benefits, child care and grievance procedures.

> "Discrimination in admission to college is widespread . . . . Discrimination in admission to graduate schools is, if anything, even more widespread, despite the fact that women's undergraduate grade point averages are higher than men's . . . . Discrimination against women does not end with admission; it pervades every level of the teaching profession . . . ."

Institutions reached by the Equal Rights Amendment will be those which are state supported, but interesting questions arise relative to giving of content to the term "state supported." If the formulation of what constitutes "state action" sufficient to allow remedy of denial of equal protection under the Fourteenth Amendment is adopted in litigation invoking the Equal Rights Amendment, the courts will take a case by case approach to weigh the degree of state involvement, McQueen v. Drucker, 438 F.2d 781 (1 Cir. 1971). The state connection need not be exclusive or direct, United States v. Guest, 383 U.S. 745 (1966), as long as there is some participation in management and control in an enterprise of a nominally private party, Evans v. Newton, 382 U.S. 296 (1966); Baldwin v. Morgan, 287 F.2d 750 (5 Cir. 1961); "Developments in the Law of Equal Protection," 82 Harv. L. Rev. 1065, 1069 (1970). As a consequence, state action has been found when the state's regualtory power is exerted, Lavoie v. Bigwood,

40 LW 2584 (1 Cir. 1972); Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D. N.C. 1971); Seidenberg v. McSorley's Old Ale House, Inc., 308 F.Supp. 1253 (S.D. N.Y. 1969).

There may even be state involvement where there is no financial support and the trustees are private persons, as in Commonwealth of Pennsylvania v. Brown, 270 F.Supp. 782 (E.D. Pa. 1967) aff'd. 392 F.2d 120 (3 Cir. 1967) cert. den. 391 U.S. 921 (1968), wherein Girard College was extended benefits of tax exemptions and was subject to the general supervision of the State Department of Public Instruction and the State Department of Welfare; however, it was never a ". . . 'public school' in the sense that it was ever administered by the Philadelphia Board of Education." Id., at p. 791.

Instances wherein private businesses have entered into agreements importing a continuing relationship with the state have also been designated as operation under state law, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (municipal agency leased a portion of its property to the owner of a coffee shop); McQueen v. Druker, supra (facility constructed under the National Housing Act); Smith v. Holiday Inns of America, 336 F.2d 630 (6 Cir. 1964) (motel built on land purchased from the Nashville

Housing Authority); Eaton v. Grubbs, 329 F.2d 710 (4 Cir. 1964) (privately endowed hospital and land would revert to city in case of disuse or abandonment); Hampton v. City of Jacksonville, 304 F.2d 320 (5 Cir. 1962) (deed conveying city owned golf course to private individuals included a reverter clause; Smith v. Y.M.C.A. of Montgomery, 316 F.Supp. 899 (N.D. Ala. 1970) (co-operation with city recreation authorities; transfer of park to defendant with conditions allowing repurchase if facility not built).

Acceptance of federal monies and a showing of some of the same elements discussed above with reference to state action, might subject a "private" institution to legal action under the Equal Rights Amendment. Further light may be shed on the subject by the case presently pending on appeal, "Dr. Ina Braden v. University of Pittsburgh," wherein the court will determine whether an institution receiving 34% of its budget from state appropriations, with one-third of its trustees named by public officials is sufficient basis for finding state involvement permitting suit for discrimination against women faculty members at the University of Pittsburgh and all of its branches in all conditions of employment brought under the First and Fourteenth Amendment.

If an institution, public or with the requisite state link is sued under the Equal Rights Amendment, one effect may be that assumptions commonly indulged in regarding women's capabilities and proclivities which have been argued as furnishing a reasonable basis for different treatment will be struck down. Many university administrators still believe that women professors are marginal employees who will be leaving the work force to have a family, never to return again. This notion extends to "faculty wives" who are also academicians. Others have expressed doubt as to the sincerity and depth of commitment of women as scholars, which does not appear to be based on any known study. Instead, it is refuted by the situation of the very high per centage of the women holding doctorates being employed today.

Such assumptions die hard, but their demise has already been pronounced in a Title VII sex discrimination case, Weeks v. Southern Bell Telephone and Telegraph Company, 408 F.2d 228 (5 Cir. 1969) at p. 236:

> "Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing."

In measuring equal treatment, it is likely that courts will advert to the methods used in other discrimination cases where statistics played such a significant role. The essence of these cases is that "statistics often tell much and Courts listen," which finds expression in Alabama v. United States, 304 F.2d 583, 586 (5 Cir. 1962), affirmed, 371 U.S. 37 (1962); Turner v. Fouche, 396 U.S. 346 (1970); Hawkins v. Town of Shaw, 437 F.2d 1286 (5 Cir. 1971). Because many universities' statistics on the pay and promotion of women manifest discrepancies when contrasted with that of men, institutions should be aware that once such a showing is made, the burden shifts to the university to prove that discrimination did not take place, Carter v. Gallagher, 452 F.2d 315 (8 Cir. 1971); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8 Cir. 1970).

If women are successful in suits brought under the Equal Rights Amendment, the remedies they may obtain will be of great significance. Back pay could be awarded in accordance with Title VII cases, Bowe v. Colgate, 272 F.Supp. 332, modified and remanded, 416 F.2d 711 (7 Cir. 1969), and could mean restitution of interest and other losses occasioned by the unlawful discrimination, Phelps Dodge Corporation v. National Labor Relations Board, 313 U.S.

177 (1941); interest may be included, Tidwell v. American Oil Company, 332 F.Supp. 424 (D.C. Neb. 1971). In class actions the amounts may be quite large.

Attorney fees payable to the lawyer representing those suing the university would also be recoverable, if Title VII and other civil rights decisions based on constitutional grounds are followed, Clark v. American Marine Corporation, 320 F.Supp. 709 (E.D. La. 1970), affirmed, 437 F.2d 959 (5 Cir. 1971). In two recent Title VII cases, an hourly fee in excess of $70.00 per hour was awarded, Rosenfeld v. Southern Pacific Company, 4 FEP Cases 72 (C.D. Cal. 1971); Peters v. Missouri Ry. Co., 3 FEP Cases 793 (E.D. Tex. 1971) ($44,000.00 was awarded for 483 hours, or in excess of $80.00 per hour).

In addition, courts have recently permitted a claim of punitive damages to be urged in Title VII cases, Tooles v. Kellogg, 336 F.Supp. 14 (D. Neb. 1972), citing "Developments In the Law--Employment Discrimination and Title VII of the Civil Rights Act of 1964," 84 Harvard Law Review 1109, 1259.

Individual administrators and trustees and/or regents have already been sued personally in court actions, Board of Trustees of Arkansas A & M College v. Davis, 396 F.2d 730 (8 Cir. 1968); Holliman v. Martin, 330 F.Supp. 1

(W.D. Va. 1971). The possibility of legal action against the trustees or regents by the alumni for breach of trust in defending a law suit in which the evidence of sex discrimination is very compelling is not too remote to pretermit consideration. To support such allegations, the contention might be made that these governing bodies continued to adhere to discriminatory policies and pay scales which were implemented with their knowledge and concurrence even after the discrepancies in men and women's salaries and promotions had been brought to their attention through HEW compliance review or otherwise.

Conclusion

It is safe to say that with the advent of increasing governmental regulation of university employment procedures and practices, campuses will never be the same again. In these times of decreasing dollars for higher education, the prospect of extensive litigation presents administrators with a number of options for action. They might choose to listen objectively to women's demands, and attempt to refrain from defensive reactions of attempting to justify practices which excluded women and minorities. They might choose to ignore these demands and engage in lengthy legal proceedings and run the risk of substantial damages and

attorney fees both for the university's counsel and the attorney for the plaintiffs.

These are two ways to deal with the challenge of the new legal requirements. At this moment there is the opportunity to make constructive changes without the trauma of legal action. It is my hope that the far reaching issues raised by women and minorities will be resolved in the most positive fashion at the conference table; if not, they will surely have to be resolved in the courts.